NASRI v. MESAH

[F.C. (Ong C.J. (Malaya) Gill and Ali F.JJ.) September 8, 1970]

[Ipoh — Federal Court Civil Appeal No. X. 93 of 1969]

Limitation — Action for specific performance of agreement for sale of land — Action to recover land — When period of limitation begins to run — When "cause of action" arises — Limitation Ordinance, 1953.

Land Laws — Agreement to sell land — Moratorium — Breach — "Cause of action".

The appellant claimed for specific performance of an agreement dated June 5, 1947 whereby the respondent agreed to sell to him some land belonging to her. The appellant had paid the agreed price for the land but no document of transfer was executed because of the moratorium then in force. After the expiration of the moratorium on September 30, 1949 the appellant approached the respondent on several occasions and requested her to execute a transfer of the land. Eventually the appellant commenced the action on March 3, 1967. The action was dismissed in the High Court on the ground of limitation. The appellant appealed.

Held, allowing the appeal: (1) in this case whether the action was for specific performance of an agreement for the sale of land or for a declaration of title to land, it was essentially an action to recover land, and the period of limitation therefore would be twelve years;

(2) time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. A cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach.

Cases referred to:-

(1) *Noyes* v. *Crawley* (1878-79) 10 Ch. D. 31.

(2) *Ponnusamy & Anor.* v. *Nathu Ram* [1959] M.L.J. 86.

(3) *Ng Moh* v. *Tan Bok Kim & Anor.* [1969] 1 M.L.J. 46.

(4) *Lala Soni Ram* v. *Kanhaiya Lal* L.R. 40 I.A. 74.

(5) *Williams* v. *Thomas* [1909] 1 Ch. D. 713, 730.

(6) *Bolo* v. *Koklan & Ors.* L.R. 57 I.A. 325.

(7) *Read* v. *Brown* [1889] 22 Q.B.D. 128, 131.

(8) *Reeves* v. *Butcher* [1891] 2 Q.B. 509, 511.

(9) *Hemp* v. *Garland* L.R. 4 Q.B. 519.

(10) *Board of Trade* v. *Cayzer, Irvine & Co.* [1927] A.C. 610, 617.

(11) *Gibbs* v. *Guild* [1881] 8 Q.B.D. 296, 302.

(12) *Tool Metal Co.* v. *Tungsten Electric Co.* [1955] 2 All E.R. 657.

FEDERAL COURT.

A. Mahendran for the appellant.

R. Ponnudurai for the respondent.

Cur. Adv. Vult.

Gill F.J.: This is an appeal against the dismissal by Chang Min Tat J. of the appellant's action in the High Court at Ipoh, in which he claimed for specific performance of an agreement dated the 5th day of June, 1947 whereby the respondent had agreed to sell to him her land held under Entry Mukim Register No. 3400 for lot No. 3970 in the Mukim of Sabak in the district of Sabak Bernam. The action was dismissed on the ground that it was barred by limitation.

The facts of the case as set out in the plaintiff's statement of claim are as follows. The plaintiff paid to the defendant the agreed purchase price of $1,000 on the date of the agreement, and the defendant on the same day handed to the plaintiff the issue document of title in respect of the said land. No document of transfer was executed as it would not have been possible to have it registered because of the moratorium then in force, but the defendant undertook to execute a valid and registrable transfer of the land in favour of the plaintiff when the moratorium was lifted. The plaintiff went into occupation of the land, built a plank house with zinc roof thereon and has lived there with his family ever since and paid the quit rent. The greater part of the land was covered with secondary jungle at the time of the sale. He spent about $10,000 in clearing and cultivating the land with coconut trees which are now bearing fruit.

After the expiration of the moratorium period on 30th September, 1949 the plaintiff approached the defendant on several occasions and requested her to execute a valid and registrable transfer of the land. The defendant received sums of money from the plaintiff as travelling expenses but failed to call at the land office at Sabak Bernam to execute the transfer. Some time in 1966 the plaintiff lodged a *caveat* against the land, vide *caveat* presentation No. 499 of 1966. On 25th October, 1966 his solicitors sent a notice to the defendant requiring her to execute a transfer within 14 days from the receipt thereof, but the letter was returned undelivered with the remark "unknown". On 8th November, 1966 he caused another notice to be sent to the defendant care of one Kardi bin Tatang, of Parit 5, Sungei Tungku, Telok Anson. There being no response from the defendant, he commenced his action on 3rd March, 1967.

Apart from her other defences which now call for no consideration, the defendant raised the defence of limitation. When the action came up for trial, counsel for both parties informed the court that they had agreed not to call any evidence and that if limitation was held not to apply the defendant would consent to judgment. This was tantamount to a plea of limitation being taken as a preliminary point of law, by way of demurrer, under Order 25, rule 2 of the Rules of the Supreme Court, 1957, so that the court in deciding that point of law had to accept the facts stated in the statement of claim as being correct (see *Noyes* v. *Crawley*[1]). The learned trial judge quite rightly dealt with the case on that basis.

The arguments put forward by counsel for the parties in support of their respective cases were short and simple. Counsel for the defendant contended that as the relevant period of limitation was 12 years and that since time began to run from 1st October, 1949, the day immediately following the expiration of the moratorium period, the plaintiff's action was time-barred. For this contention he relied on the decision of the court of appeal in *Ponnusamy & Anor.* v. *Nathu Ram,*[2] and he went on to say that the decision of this court in *Ng Moh* v. *Tan Bok Kim & Anor.*[3] was not applicable. He also pointed out that the defendant was still the registered proprietor of the land and referred to section 341 of the National Land Code relating to adverse possession.

Counsel for the plaintiff said that he was relying on *Ng Moh's* case,[3] and that in the present case time began to run as from 14th October, 1966. The reason for his picking on that date, though no mention of it was made to the learned trial judge, presumably was that on that date the defendant had written a letter to the plaintiff asking him to hand over to her within 14 days from the date of the letter the grant of title in respect of the land and forbiding him to enter the land or take any produce therefrom. This letter was not produced to the court but a copy of it has been included in the appeal record without any objection having been taken by the respondent to such inclusion.

I would pause here to observe in passing that the law relating to limitation on the date of the agreement was contained in the Limitation Enactment (F.M.S. Cap. 18). That Enactment was repealed by the Limitation Ordinance, 1953 which came into force on 19th February, 1953. It is clear that the law of limitation which applies is the law in force on the date of institution of the action and not the date on which the cause of action arises (see *Lala Soni Ram* v. *Kanhaiya Lal*[4]).

The facts in *Ponnusamy's* case[2] were as follows. In August, 1944, during the Japanese occupation, Nathu Ram for valuable consideration executed in favour of one Naina a transfer in statutory form, handed over to him the relevant issue document of title and put him in possession of the land. For reasons which were not clear, the transfer was not registered during the occupation. Thereafter, by reason of the Moratorium Proclamation, it was not capable of being registered until 1st October, 1949 when the moratorium was lifted. Naina had died testate on 11th February, 1949 but there was considerable delay in extracting probate. Eventually, when probate was taken out, Nathu Ram refused to execute a fresh transfer in favour of the executors who thereupon commenced an action in the High Court at Ipoh on 23rd November, 1956 claiming a declaration of title to the land and an order on the registering authority to register the executors as proprietors. Their action was dismissed on the ground that it was barred by limitation. They appealed. It was argued on behalf of the respondent in the Court of Appeal that the period of limitation was six years. That argument, however, was rejected by the court. Thomson C.J. (as he then was) in the course of his oral judgment said:

"As I put it colloquially this morning in the course of discussion with counsel, what the plaintiffs are doing is this. They are coming to the court and saying 'we are entitled to this land and we want this land'. And if the court is in agreement with them that they are entitled to the land and should be given the land, one appropriate way of giving it to them, in view of the provisions of the Land Code, is to make the declaration asked for and the consequential order on the registering authority. That reasoning leads me to the conclusion that this is an action to recover land within the meaning of section 9 of the Limitation Ordinance (No. 4 of 1953)."

He went on to say that he found support for that view in the following passage in the judgment of Buckley L.J. in the Court of Appeal in *Williams* v. *Thomas*[5]:

"It has been argued, and, I think, successfully that while on the one hand the expression 'to recover any land' in section 2 of the Act of 1833 does not mean regain something which the plaintiff previously had and has lost, but means 'obtain any land by judgment of the court', yet it is not limited to the meaning 'obtain possession of any land by judgment of the court'. For it has been held that a mortgagee's action for foreclosure is an action for the recovery of land within the Act. A foreclosure action is not an action to obtain possession, but is an action whose principal purpose is to convert that which in a Court of Equity was but personal estate of the mortgagee into real estate of the mortgagee. It is an action to enable him to hold the legal estate already vested in him discharged from the right of the mortgagor to redeem him."

He then said that what in effect the plaintiffs were seeking to do was to "obtain . . . land by judgment of the court", and continued:

"Having reached the conclusion that this is an action to recover land it seems to me impossible to avoid the further conclusion that the case falls within section 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case of actions founded on a contract the period of limitation shall be six years but that provision is expressly stated to be 'save as hereinafter provided'. By section 9, however, it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be 12 years and it is clear that this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise."

In *Ng Moh's* case[3] the respondents as plaintiffs claimed for the return of a certain piece of land from the appellant on the ground that the land belonged to the estate of Tan Pung Chong deceased and that they were the administrators *de bonis non*. The appellant counter-claimed that the land had been sold to him by Lim Pheng, the previous administratrix of the said estate, under an agreement dated 30th December, 1950 after which he had gone into occupation of the land, and prayed for specific performance of the agreement. Both counsel conceded that this being an action for the recovery of land the period of limitation was 12 years.

The facts in the present case are not very different from those in *Ponnusamy's* case.[2] Here, as in that case, the plaintiff paid the full purchase price for the land, the relevant issue document of title was handed over to him and he went into possession of the land. For the reasons which I have already stated, there was no transfer executed in the statutory form in this case, as there was in *Ponnusamy's* case.[2] But the transfer executed in that case had become incapable of registration by reason of Naina's death, so that the position of the respective purchasers was almost the same. In *Ponnusamy's* case[2] the plaintiffs asked for a declaration of title to the land and an order on the registering authority to register them as proprietors. In the present action the plaintiff's prayer was for an order that the defendant do execute a valid and registrable transfer of the land. In other words, he was asking for specific performance of the agreement as in *Ng Moh's* case.[3] But what in effect he was seeking to do was to obtain the land by a judgment of the court. It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

Having disposed of the question as to the period of limitation in relation to an action for the recovery

of land, I must now come to the question as to when such period of limitation begins to run.

In determining this question the learned judge in the court below thought that he had to choose between the conflicting decisions in *Ponnusamy's* case[2] and *Ng Moh's* case,[3] both of which were binding on him. The decision of the Federal Court in *Ng Moh's* case[3] was that time did not begin to run until there was an infringement of the appellant's right under the sale agreement. The appellant in that case had sent to Lim Pheng, the then administratrix, a letter dated 15th April, 1955 requiring her to comply with the terms of the agreement within 14 days. The court therefore held that time began to run from 30th April, 1955, so that the appellant's counterclaim, which was filed on 16th September, 1955, was not barred by limitation. In coming to that decision the court relied entirely on the judgment of the Privy Council in *Bolo* v. *Koklan and ors.*[6] in which it was said at page 331:

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

Bolo's case[6] was a decision on article 120 of the Indian Limitation Act which is in *pari materia* with article 97 of the F.M.S. Limitation Enactment. It was cited in *Ponnusamy's* case,[2] although no mention of it was made in the judgment of Thomson C.J. The learned trial judge has stated in his grounds of judgment that, as *Ponnusamy's* case[2] is not mentioned in the judgment in *Ng Moh's* case,[3] it was not clear to him whether the latter case was meant to overrule the former. He has further stated in his judgment that the Indian Limitation Act speaks of "right to sue", whereas the Limitation Ordinance, 1953 speaks of "cause of action" or "right of action", although he did not go on to say whether there was any distinction between "accrual of a right to sue' and "accrual of a cause or right of action". In the event he decided that he was bound by *Ponnusamy's* case[2] and that *Ng Moh's* case[3] was decided *per incuriam.*

With respect to the learned trial judge, there is no conflict between the decision in *Ponnusamy's* case[2] and the decision in *Ng Moh's* case.[3] The sole question to be decided in *Ponnusamy's* case[2] was whether the period of limitation was six years or twelve years. The question which had to be and was decided in *Ng Moh's* case[3] was whether time began to run from the date of the agreement or from the date of any infringement or threat of infringement of the appellant's right under the agreement. What presumably led the judge to think that there was a conflict between the two cases is the following passage in the judgment in *Ponnusamy's* case[2]:

"It follows from what has been said that the period of limitation applicable in the present case was 12 years by reason of section 9 and not 6 years by reason of section 6 and it is common ground that by reason of the post-war legislation on the subject that period of limitation runs from the expiration of the moratorium period on 30th September, 1949. In the circumstances the present action was commenced well within time."

I must confess that I myself as the trial judge in *Ng Moh's* case[3] fell into the same trap. On reflection, however, it would seem clear to me that what Thomson C.J. was saying in the above passage was by way of a general observation that for the purpose of computing any period of limitation the moratorium period was to be excluded. He clearly did not say in so many words that limitation in that case began to run from the expiration of the moratorium period on 30th September, 1949.

A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (*per* Lord Esher M.R. in *Read* v. *Brown*[7]). *In Reeves* v. *Butcher*[8] Lindley L.J. said:

"This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp* v. *Garland*[9], decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought."

In *Board of Trade* v. *Cayzer, Irvine & Co.*[10] Viscount Dunedin described "cause of action" as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (*per* Field J. in *Gibbs* v. *Guild*[11]). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo's* case[6]). It would seem clear, therefore, that the expressions "the right to sue accrues", "the cause of action accrues" and "the right of action accrues" mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

For the reasons I have stated, the period of limitation in the present case can be said to have begun to run only from the first clear and unequivocal threat to the plaintiff's right to a transfer of the land. The learned trial judge has stated in his grounds of judgment that if *Ng Moh's* case[3] was binding on him, then he would hold on the pleadings that the first clear and unequivocal threat to the plaintiff's right to possession was the refusal to the first request after the expiration of the moratorium as alleged in the statement of claim. With respect, there is not the slightest indication from the plaintiff's statement of claim that the defendant at any time clearly and unequivocally refused to sign a transfer. Not even in the defendant's statement of defence, which of course the court is not entitled to look at, is there any mention of any refusal. As there is no specific averment in the statement of claim as to when the first of the plaintiff's requests was made, it would be a pure conjecture to say that such requests must have been made shortly after the lifting of the moratorium. There can therefore be no basis for the learned judge's finding that such request were refused by necessary implication.

The fact that the plaintiff chose not to lodge a *caveat* against the land until 1966 would seem to indicate that until then there was no threat to his right

under the agreement. In this connection it is significant that the first clear refusal by the defendant was contained in her letter of 14th October, 1966 to which I have made reference earlier in my judgment. That letter, however, was not in evidence at the trial, although it has been included in the appeal record. Assuming that we are not entitled to look at it, we have to fall back on the plaintiff's letter of 8th November, 1966 which he sent to the defendant care of another person. As there is no evidence that that letter reached the defendant, the position would therefore appear to be that there never was any refusal by the defendant to carry out her obligations under the contract. In the circumstances, it may be argued that this action was premature, but that was not the stand taken by the defendant. In any event, service of the writ on the defendant constituted notice of the appellant's intention to stand on his legal right under the agreement (see *Tool Metal Co.* v. *Tungsten Electric Co.*[12]), and there was no threat to infringe that right until the defence was filed. Whatever view I take of the case, it would seem clear that time did not begin to run against the plaintiff until shortly before the action was filed. It was therefore not barred by limitation.

I would allow the appeal with costs here and in the court below, set aside the order made by the court below and make an order that the defendant do execute a valid and registrable transfer in terms of the plaintiff's claim within 14 days from today, and that in the event of her refusal or failure to execute such transfer within that period the Registrar of the High Court at Ipoh do execute a transfer on her behalf.

Ong C.J.: I agree with the judgment just delivered by Gill F.J., to which there is nothing I can usefully add. The order of this court will be in terms as proposed by him.

Ali F.J. concurred.

Appeal allowed.

Solicitors: *Mahendran & Co.; Rajendra & Teik Ee.*

LEONG CHEE KUM & ANOR. v. NG AH LAU

[A.C.J. (Chang Min Tat J.) August 24, 1970]

[Ipoh — Civil Appeal No. 5 of 1970]

Landlord and Tenant — Claim for possession on the ground that premises have been used for an illegal purpose — Conviction of tenant's wife for using premises as a common gaming house — Validity of notice to quit — Control of Rent Act, 1966, s. 16(1)(d).

This was an appeal by the landlord against the decision of the learned magistrate in dismissing his action for possession of premises. The application had been made under section 16(1)(d) of the Control of Rent Act, 1966, on the ground that the tenant's wife had used the premises for an illegal purpose, *viz.* for a common gaming house. For proof of such user, reliance was made on the conviction of the tenant's wife for the offence of using the premises as a common gaming house. Written notice of termination of the tenancy had been given and served on the tenant's wife.

Held, allowing the appeal: (1) the notice to quit in this case had clearly been brought to the notice of the tenant and for the proper period;

(2) in this case the conviction of the tenant's wife on her plea of guilty had been rightly admitted and there was therefore evidence in this case that the wife of the tenant had assisted in carrying on a public lottery in the demised premises.

Cases referred to:-

(1) *Champion Motors (M) Ltd.* v. *Leong Siew Kwan* [1968] 2 M.L.J. 31.

(2) *Loh Chik San* v. *Loh Chak Wan* [1961] M.L.J. 255.

(3) *Lim Kien Mok* v. *B.H. Kevan* [1963] M.L.J. 284.

(4) *Doe d. Cox & Ors.* (1802) 4 Esp. 185; 170 E.R. 685.

(5) *Loh Peck Hoo* v. *Yip Lim* [1967] 1 M.L.J. 112.

(6) *Tay Chwee Cheng* v. *Singapore Sing Hua Poey Chin Association* [1968] 1 M.L.J. 176.

(7) *She Eng Gek* v. *D.A. de Silva* [1957] M.L.J. 55.

MAGISTRATE'S CIVIL APPEAL.

F. C. Arulanandom for the appellants.

S. A. Lingam for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: This is an appeal by a disappointed landlord against the decision of the learned magistrate in Ipoh in dismissing his action for possession of premises. His application was made under section 16(1)(d) of the Control of Rent Act, 1966 that the tenant's wife had used the premises for an illegal purpose, *viz.* for a common gaming house. For proof of such user, reliance was made by the landlord to the appearance of the tenant's wife in the criminal magistrate's court at Ipoh, her plea of guilty and her conviction and sentence. Written notice of termination of the tenancy was given and served on the tenant's wife. The tenant continued to hold over.

The tenant claimed to have been in occupation since 1956, and save that he admitted to being the proprietor of the defendant firm in whose name the tenancy was taken and that the person convicted of the said criminal offence was his wife, averred that he had no knowledge and did not admit that his wife had committed the offence or been convicted. There was strangely a denial of receipt of the notice to quit but it was followed by an admission of replying thereto. It was then contended that the said notice was ineffective and invalid. The tenant claimed the protection of the Control of Rent Act, 1966 and further contended that the statement of claim disclosed no cause of action.

At the trial, so far as the record shows, no objection was taken to the validity of the notice of termination. All that learned counsel for the tenant contended was that the notice to quit must be served on the tenant, presumably personally and since that was not done, the tenancy had not been duly terminated as required by section 16(5) of the Control of Rent Act, 1966. Reliance was had on two cases: *Champion Motors (M) Ltd.* v. *Leong Siew Kwan*[1] and *Loh Chik San* v. *Loh Chak Wan.*[2]

The learned magistrate in his grounds of judgment did not agree with this contention. Surely, learned counsel could not be right in his submission or in his reliance on the two cases cited by him. In the *Cham-*